93-439

No. _____

Supreme Court, U.S.
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IN THE SUPREME COURT
OF THE UNITED STATES

October Term, 1993

PETER JOSEPH SALZMANN,
Petitioner,

v.

STATE OF OREGON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

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September 1993

Question Presented

During this criminal defendant's jury trial he moved to dismiss based on prosecutorial misconduct. The motion was denied. The jury was unable to reach a verdict, and the state seeks to re-try him. After the trial he filed a motion to dismiss on the grounds of double jeopardy, which was denied.

Does the petitioner, a criminal defendant, have a federal constitutional right, under the Double Jeopardy Clause, to an interlocutory appeal of his motion to dismiss before a re-trial? Does the rule in Abney v. United States, 431 U.S. 651 (1977) apply to the states, or is it merely an interpretation of a federal statute?

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Petition for a Writ of Certiorari

Petitioner, a criminal defendant, respectfully prays that the Court issue a writ of certiorari to review the judgment and opinion of the Oregon Court of Appeals in this case.

Opinions Below

The Oregon Court of Appeals opinion is reported as State v. Salzmann, 119 Or. App. 217, 850 P.2d 1122 (1993), and is set forth in the appendix, at A-1. The defendant sought review in the Oregon Supreme Court and review was denied, without an opinion, on June 22, 1993.

Jurisdiction

The Oregon Court of Appeals is the highest court of a State in which a decision could be had in this case. Petitioner claims a right to an interlocutory appeal under the United States Constitution. Jurisdiction of this court is based on 28 U.S.C. § 1257(a).

The appellate decision was issued by the Oregon Court of Appeals on April 14, 1993. Review in the Oregon Supreme Court, which is discretionary, was timely sought and was denied in an Order on June 22, 1993. A-12. The effective date of the appellate judgment was August 30, 1993. This petition is filed within 90 days of the June 22, 1993, Order Denying Review from the Oregon Supreme Court.

Constitutional Provisions Involved

The Fifth Amendment to the United States Constitution provides in relevant part:

> ". . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb . . . . ."

Statement of the Case

Petitioner was charged with kidnapping and rape in Oregon state court. The defense was mistaken identification. He had a jury trial. During the trial he moved for a mistrial several times, claiming that the prosecutor withheld relevant exculpatory discovery and engaged in prosecutorial misconduct. The jury was unable to reach a verdict and the court declared a mistrial. The petitioner then moved to dismiss based on double jeopardy, due to the prosecutor's misconduct.[1] A-11. That motion was denied.

The prosecution seeks to re-try the case.

The petitioner sought appellate remedies in state court. He conceded that no Oregon statute authorized an

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[1] The argument on misconduct was on both state and federal grounds. Throughout the proceedings the petitioner raised state former jeopardy grounds as well, but those grounds will not be discussed here.

interlocutory appeal,[2] but argued that he had a federal right

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[2] The statute on appeals for criminal defendants, provides:

Or. Rev. Stat. § 138.040:
(1) Except as provided under ORS 138.050 [regarding an appeal after a guilty plea], the defendant may appeal to the Court of Appeals from a judgment or order described under ORS 153.053 in a district or circuit court, and may cross-appeal when the state appeals . . . . .

Or. Rev. Stat. § 138.053:
(1) This section establishes the judgments and orders that are subject to the appeal provisions and to the limitations on review under ORS 138.040 and 138.050. A judgment or order of a court, if the order is imposed after judgment, is subject to ORS 138.040 and 138.050 if this disposition includes any of the following:

(a) Imposes a sentence on conviction.

(b) Suspends imposition or execution of sentence.

(c) Places a defendant on probation.

(d) Extends a period of probation.

(e) Imposes or modifies a condition of probation or of sentence suspension.

under the double jeopardy clause to have an interlocutory appeal, citing Abney v. United States, 431 U.S. 651 (1977). Motion to Determine Appellate Jurisdiction, page 1. He filed two cases simultaneously, only the first is directly relevant to this petition.

First, he filed a notice of appeal in the Oregon Court of Appeals, claiming that the federal double jeopardy clause gave him a right to a pre-trial appeal. The Court of Appeals dismissed the appeal, originally without writing any opinion. Later, on reconsideration, the Court of Appeals wrote an opinion which is reported at 119 Or. App. 217, 850 P.2d 1122 (1993). The court specifically discussed the federal double jeopardy clause, and held that Abney did not hold that a defendant has a constitutional right to an interlocutory appeal. As the right to appeal is statutory, and there is no applicable statute, the state court held there was no right to an interlocutory appeal. The petitioner sought review in the Oregon Supreme Court, which has discretionary review. It denied review on June 22, 1993. An appellate judgment was issued August 30, 1993. The petitioner seeks a writ of certiorari from this.

(f) Imposes or executes a sentence upon revocation of probation or sentence suspension. . . . .

(3) . . . upon an appeal from a judgment or order described in paragraph (f) of subsection (1) of this section, the appellate court may review the order that revoked the defendant's probation or sentence suspension.

Second, simultaneously he filed a petition for a writ of mandamus in the Oregon Supreme Court under Or. Rev. Stat. § 34.105-.240. The Oregon Supreme Court has discretion as to whether or not to hear such petitions, and it declined to hear it. Or. Constitution Art VII (Amended) § 2. He does not seek review of this ruling.

The proceedings have been stayed in the trial court pending appellate review.

Reasons for Granting the Writ

The constitutional double jeopardy protection guarantees that a criminal defendant not be subjected to a second trial. United States Constitution, Fifth Amendment. The guarantee is meaningless if there is no mechanism, such as an appeal, to review the double jeopardy claim before the second trial.

This point was recognized in Abney v. United States, 431 U.S. 651, 661-62 (1977).

> "'[T]he State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity, as well as enhancing the possibility that even though innocent he may be found guilty.'[Citations

omitted]

> "Obviously, these aspects of the [double jeopardy] guarantee's protections would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken; even if the accused is acquitted, or, if convicted, has his conviction ultimately reversed on double jeopardy grounds, he as still been forced to endure a trial that the Double Jeopardy Clause was designed to prohibit."

This Court held that the defendant would be allowed an interlocutory appeal, even though the applicable federal statute provided that appeals were to be from "final decisions." 431 U.S. 662.

Here the Oregon court held that Abney was based on a federal statute, 28 U.S.C. § 1291, rather than on the Fifth Amendment Double Jeopardy Clause. 119 Or. App. 224, 850 P2d at 1126, A-7. Other states have varied in their reading of Abney. Some say it describes a constitutional right. Some say it does not, but that the state procedure does permit an interlocutory hearing. See, e.g., Nalbandian v. Superior Court, 163 Ariz. 126, 786 P.2d 977 (Ariz. App. 1989), cert denied, 111 S.Ct. 554 (1990) (discussing the debate, holding the appellate right is constitutional, and employing a state statute to effectuate the right); State v. Milenkovich, 236 Neb. 42, 458 N.W.2d 747 (1990) (discussing the debate, not resolving the basis

of the right, and employing a state statute to grant an appeal.)[3]

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[3] See: ARIZONA: Nalbandian v. Superior Court, 163 Ariz. 126, 786 P.2d 977, supra; COLORADO: County Court in and for the City of El Paso v. Ruth, 194 Colo. 352, 571 P.2d 1, 4 (Colo. 1978) (writ of prohibition); CONNECTICUT: State v. McKenna, 188 Conn. 671, 453 A.2d 435 (1982) (interlocutory appeal, apparently via statute); DISTRICT OF COLUMBIA: Routh v. United States, 483 A.2d 638 (D.C. Ct. App. 1984) (interlocutory appeal, citing Abney); GEORGIA: Selvey v. State, 201 Ga. App. 848, 412 S.E.2d 611 (1991) (appeal of right, citing statute and caselaw); ILLINOIS: Mosley v. Carey, 74 Ill.2d 527, 387 N.E.2d 325, cert. denied (1979) (holding appeal a matter of statute, but other mechanisms for pre-trial review are available); KANSAS: Petition of Lucas, 276 Kan. 486, 789 P.2d 1157, 1159 (1990) (hearing via habeas corpus); KENTUCKY: Crawley v Kunzman, 585 S.W. 2d 387, 388 (Ken. 1979) (by order of prohibition, citing Abney); MAINE: State v. Hanson, 483 A.2d 723 (Me. 1984) (by appeal, citing Abney); MARYLAND: Grey v. State, 36 Md. App. 708, 375 A.2d 31 (1977) (by appeal, citing Abney); MASSACHUSETTS: Com. v. Chatfield-Taylor, 399 Mass. 1, 502 N.E.2d 512 (1987) (by petition); MISSISSIPPI: Griffin v. State, 545 So.2d 729, 732 (Miss. 1989) (interlocutory appeal under court rule, state caselaw, and Abney); NEBRASKA: State v. Milenkovich, 236 Neb. 42, 458 N.W.2d 747 (1990), discussed above; NEW HAMPSHIRE: State v. Janvrin, 121 N.H. 370, 430 A.2d 152 (1981) (interlocutory appeal, citing Abney); NEW

MEXICO: State v. Mestas, 93 N.M. 795, 605 P.2d 1164 (1980) (interprets statute as permitting interlocutory appeals); NEW YORK: Wiley v. Altman, 52 N.Y.2d 410, 438 N.Y.S.2d 490, 420 N.E.2d 371 (1981) (by statute); NORTH DAKOTA: State v. Robideaux, 475 N.W.2d 915 (N.D. 1991), aff'd on other gds., 493 N.W.2d 210 (1992) (no direct appeal, but other methods to secure pre-retrial review of double jeopardy claim); OHIO: is mixed: State v. Broughton, 62 Ohio St 3rd 253, 581 N.E.2d 541, 549 (1991) noted that there is no appeal of right, but the court, sua sponte felt "compelled to review" in this case; PENNSYLVANIA: Com. v. Bolden, 472 Pa. 602, 373 A.2d 90 (1977) (appeal); RHODE ISLAND: State v. Sundel, 460 A.2d 939 (R.I. 1983); TENNESSEE: Whitwell v. State, 520 S.W. 2d 338 (Tenn. 1975); TEXAS: Ex parte Robinson 641 S.W. 2d 552 (Tex. Crim. 1982) (holding Abney based on Fifth Amendment, habeas corpus is mechanism); UTAH: State v. Ambrose, 598 P.2d 354, 357 (Utah 1979) (interprets statute to allow); WEST VIRGINIA: State ex rel Dowdy v. Robinson, 257 S.E.2d 167 (W. Va. 1979) overruled on other gds., 289 S.E.2d 720 (1982) (appeal); WISCONSIN: State v. Jenich, 94 Wisc. 2d 74, 292 N.W.2d 348 (1980) (permissive statutory appeal); WYOMING: Stamper v. State, 672 P.2d 106 (Wyo. 1983) (there must be an appellate remedy).

Counsel has found four jurisdictions that do not permit interlocutory review. ALABAMA: Jones v State, 450 So.2d 186 (Ala. 1984); MONTANA: State ex rel Forsyth v. District Court, 216 Mont. 480, 701 P.2d 1346

This Court has left the issue open. In Spradling v. Texas, 455 U.S. 971 (1982) Justices Brennan and Marshall dissented from a denial of a petition for a writ of certiorari to the State of Texas on a interlocutory appeal of a double jeopardy claim. In Green v. Ohio, 455 U.S. 976 (1982) Justices White, Blackmun, and Powell dissented from a denial of a petition for a writ of certiorari to the State of Ohio on an interlocutory appeal of a double jeopardy claim. Justice White wrote that Abney was not by its terms limited to federal cases and noted that the Court has long recognized that statutory finality requirements should not be construed to cause irreparable injuries. 455 U.S. at 979.

In civil cases the Court has permitted an interlocutory appeal from state court regarding a party's federal-law claim that he is not subject to suit. See, Mitchell v. Forsyth, 472 U.S. 511, 525 n.8 (1985).

(1985); NORTH CAROLINA: State v. Joseph, 92 N.C. App 203, 374 S.E. 2d 132 (1988), cert denied; SOUTH CAROLINA: State v. Miller, 289 S.C. 426, 346 S.E. 2d 705 (1986) (saying Abney a matter of statute).

OREGON's most recent Supreme Court decision, holding an interlocutory appeal is not available, is pre-Abney. State v. Haynes, 232 Or. 330, 375 P.2d 550 (1962), see also State v. Endsley, 214 Or. 537, 331 P.2d 338 (1958).

Petitioner believes that a fair reading of Abney establishes that it is constitutionally based. The Court was compelled to put a gloss on the applicable statute to permit the interlocutory appeal: the discussion of the statute was a discussion of the mechanism the court was using to effectuate the constitutional right. This Court reiterated the ruling in Richardson v. United States, 468 U.S. 317, 322 (1984), despite the government's argument that pre-retrial review would require the appellate court to review the sufficiency of the evidence.

Other rulings from this Court underline the point. When a constitutional guarantee protects a defendant from going to trial at all, there must be a tool to effectuate that right. Helstoski v. Meanor, 442 U.S. 500 (1979) held that the Speech or Debate Clause protects a member of Congress from being questioned in any other place for any speech or debate in either house, and therefore a pre-trial appeal is permitted. Mitchell v. Forsyth, 472 U.S. 511, 527-30 (1985) held that a claim of immunity protects a person from being forced to litigate the consequences of official conduct, and therefore a pre-trial appeal is permitted.[4] When a constitutional right can be vindicated after trial, the appeal must wait until after the trial.

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[4] Another permissible pre-judgment appeal is from the denial of a motion to reduce bail. Stack v. Boyle, 342 U.S. 1 (1951). The right to pre-trial bail must be enjoyed pre-trial, or not at all. Here, the appeal ordinarily would not interrupt the trial.

Midland Asphalt v. United States, 489 U.S. 794 (1989) (right to grand jury secrecy can be heard after trial); Flanagan v. United States, 465 U.S. 259 (1984) (right to permissible counsel of one's choice can be heard after trial); United States v. Hollywood Motor Car Co., 458 U.S. 263 (1982) (right to be free of vindictive prosecution can he heard after trial); United States v. MacDonald, 435 U.S. 850 (1978) (right to a speedy trial can be heard after trial).

A criminal defendant would always prefer to have a dismissal rather than a trial. The Constitution does not protect that preference. What it does protect are its own guarantees that a trial not be had, as when a defendant raises the Double Jeopardy Clause or the Speech or Debate Clause.

Abney noted that there is no federal constitutional right to an appeal. 431 U.S. 656. Indeed, the State of Oregon could abolish its own appellate courts without objection from the federal courts, but that abolition would not end a criminal defendant's right to a mechanism to vindicate his federal rights. Having set up a state appellate system, that is an available mechanism for the petitioner, just as the federal appellate system and 28 U.S.C. § 1291 was the available mechanism for Mr. Abney. The absence of a state statute does not foreclose the petitioner's rights under the Double Jeopardy Clause.

It is instructive that most of the state courts with reported decisions have either a statute permitting an interlocutory appeal of double jeopardy claims or have a holding from the court permitting such an appeal.

There are other states, such as Oregon, that have no statute permitting an interlocutory appeal to raise a double jeopardy claim, and have a court ruling forbidding such an appeal.[5] If the Abney rule is based on the United States Constitution, those state laws are unconstitutional. If the Abney rule is not based on the United States Constitution, state courts and legislatures which have such a rule need to know that it is optional under federal law.

This Court should grant the petition and articulate the basis of the Abney rule to resolve this conflict among the states.

[5] Four other examples are listed in footnote 3. The Texas law discussed in Spradling has shifted, and there is an right of review via a state habeas corpus case. See, Ex parte Robinson, supra, footnote 3.

Conclusion

The Oregon court has decided an important question of federal law which has not been, but should be, settled by this Court. There is a conflict among the states. Therefore, the Court should issue a writ of certiorari to review the judgment and decision of the Oregon Court of Appeals in this case.

Respectfully submitted,

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September ___, 1993

IN THE COURT OF APPEALS OF THE
STATE OF OREGON

STATE OF OREGON,
Respondent,

v.

PETER JOSEPH SALZMANN,
Appellant.

(C9111-36157; CA A75561)

Appeal from Circuit Court, Multnomah County.

Kimberly C. Frankel, Judge.

On appellant's petition for reconsideration of an order dated October 30, 1992, dismissing the appeal.

Laura Graser, Portland, for petition.

Before Riggs, Presiding Judge, and De Muniz and Durham, Judges.

De MUNIZ, J.

Reconsideration allowed; appeal dismissed; order modified to delete costs.

De MUNIZ, J.

We dismissed defendant's appeal in an order of dismissal. ORAP 7.15(1). Defendant filed a petition for review, which we treat as one for reconsideration. ORAP 9.15(1). We allow reconsideration, modify our previous order and adhere to it as modified.[1] The issue is whether defendant has a right to a direct interlocutory appeal when a trial court denies a motion to dismiss on the ground of former jeopardy.[2] We conclude that he does not and allow the state's motion to dismiss the appeal.

Defendant is charged with rape, kidnapping and robbery. His defense is mistaken identity. During trial, he moved for a mistrial on several occasions, claiming that the prosecutor had engaged in misconduct by withholding relevant and exculpatory discovery. The circuit court denied those motions. The jury was unable to reach a verdict and the court declared a mistrial. Defendant moved to dismiss the charges on the ground of former jeopardy based on the nature of the prosecutor's conduct. *See State v. Kennedy*, 295 Or 260, 666 P2d 1316 (1983). The court entered an order denying defendant's motion. Defendant appeals from that order.[3]

We first analyze the issue under Oregon law. Defendant concedes, and we agree, that no statute gives him the explicit right to an interlocutory appeal from the denial of a motion to dismiss on the ground of former jeopardy.[4] However, he draws our attention to the substantive protection of

the state constitution's former jeopardy clause. *See also* ORS 131.505 to ORS 131.535. Article I, section 12 provides in part:

> "No person shall be put in jeopardy twice for the same offence [*sic*]."

As the Supreme Court recently said:

> "The purposes of the constitutional protection are to prevent the state from attempting repeatedly to convict a person for the same offense, thereby subjecting the person to embarrassment, expense, and continuing anxiety, and to give a person the right to have a trial completed by a particular tribunal once trial has begun." *State v. Wolfs*, 312 Or 646, 653, 826 P2d 623 (1992).

Defendant argues that Article I, section 10, of the state constitution gives him the right to an interlocutory appeal when a trial court denies a motion to dismiss on the ground of former jeopardy. Article I, section 10, provides:

> "No court shall be secret, but justice shall be administered, openly and without purchase, completely and without delay, and every man shall have remedy by due course of law for injury done him in his person, property, or reputation."

Defendant contends that the substantive protections of the former jeopardy clause become meaningless unless a defendant has the right to an interlocutory appeal in which trial court error may be corrected *before* a second trial takes place.

Whatever merit defendant's argument may have in the abstract, we reject it because the issue appears to be foreclosed by the broad holding of *State v. Endsley*, 214 Or 537, 331 P2d 338 (1958). In *Endsley*, the court rejected the defendant's argument that he had a constitutional right to an appeal under Article VII, section 6; Article VII (amended), section 2 and Article I, section 10. After reviewing those provisions, the court said: "[I]t is not open to doubt that appeal in this state is a statutory privilege and not a constitutional right." 214 Or at 547. Moreover, in *State v. Haynes*, 232 Or 330, 375 P2d 550 (1962), the defendant appealed from an order denying a motion to dismiss on the ground of former jeopardy. The Supreme Court, citing *Endsley*, dismissed the appeal. 232 Or at 331-32. The Supreme Court has cited

Endsley with approval many times, most recently in *State v. Carmickle*, 307 Or 1, 6, 762 P2d 290 (1988). Consequently, we must reject defendant's argument that Article I, section 10, gives him a constitutional right to an interlocutory appeal from an order denying a motion to dismiss on the ground of former jeopardy.

In a related argument, defendant contends that, even if the Oregon Constitution does not give him a right to an interlocutory appeal, "disparities" in the statutory scheme violate Article I, section 20, the Equal Privileges and Immunities Clause. That section provides:

> "No law shall be passed granting to any citizen or class of citizens privileges, or immunities, which, upon the same terms, shall not equally belong to all citizens."

Defendant claims that a defendant under the jurisdiction of the district court may challenge the denial of a motion to dismiss on the ground of former jeopardy by petitioning for a writ of mandamus in the circuit court, but that a defendant under the jurisdiction of the circuit court may make such a challenge only by seeking a writ of mandamus directly with the Oregon Supreme Court. ORS 34.120.[5]

Defendant's argument fails to demonstrate that the statutory scheme has denied him, either individually or as a member of a class to which he belongs, a right to pursue a remedy, while granting that right to others who are similarly situated. *See State v. Clark*, 291 Or 231, 630 P2d 810, *cert den*

454 US 1084 (1981); *City of Klamath Falls v. Winters*, 289 Or 757, 619 P2d 217 (1980). Moreover, the characteristics of the statutory classification are not, like gender or ethnic background, personal to a defendant so as to make the statutory classification impermissible. *Hunter v. State of Oregon*, 306 Or 529, 533, 761 P2d 502 (1988).

Defendant's argument also fails to persuade us that the Oregon Constitution[6] and the statutory scheme lack a rational basis for designating different courts to rule on petitions for writs of mandamus. *See Atlantic Richfield Co. v. Greene*, 100 Or App 16, 19-20, 784 P2d 442 (1989), *rev den* 309 Or 698 (1990). It is true that a defendant in district court must pass through more layers of review, including review by this court, if a party appeals under ORS 34.240. It is also true that a defendant in circuit court may petition the Supreme Court directly, bypassing this court. ORS 34.120; ORAP 11.05. However, under both schemes and in every case, the Supreme Court remains the final arbiter.

More importantly, the remedy of direct interlocutory appeal, which is the specific right defendant seeks here, is equally *unavailable* to all defendants, regardless of whether they find themselves under the jurisdiction of the district or circuit court. ORS 138.040; ORS 138.053; *State v. Spencer*, 88 Or App 300, 301, 744 P2d 1009 (1987).

We turn now to defendant's arguments under federal law. No federal statute gives a defendant the right to an interlocutory appeal in a state criminal proceeding. However, defendant argues that *Abney v. United States*, 431 US 651, 97 S Ct 2034, 52 L Ed 2d 651 (1977), establishes a federal constitutional requirement for interlocutory appeals of denials of motions to dismiss on the ground of former jeopardy that all states must recognize. Although we cited *Abney* in *State ex rel Wark v. Freerksen, supra* n 5, neither this court nor the Oregon Supreme Court has addressed the issue that defendant presents here.

In *Abney*, the Court stated that the issue was "whether a pretrial order denying a motion to dismiss an indictment on double jeopardy grounds is a final decision within the meaning of 28 USC § 1291 and thus immediately appealable." 431 US at 653. (Footnote omitted.)[7] It began its analysis by stating two guiding principles:

> "First, it is well settled that there is no constitutional right to an appeal. *McKane v. Durston*, 153 US 684, 14 S Ct 913, 38 L Ed 867 (1894). * * * The right of appeal as we presently know it in criminal cases, is purely a creature of statute.
>
> "Second, since appeals of right have been authorized by Congress in criminal cases, as in civil cases, there has been a firm congressional policy against interlocutory or 'piecemeal' appeals and courts have consistently given effect to that policy. Finality of judgment has been required as a predicate for federal appellate jurisdiction." 431 US at 656.

The Court applied factors that it identified in *Cohen v. Beneficial Industrial Loan Corp.*, 337 US 541, 69 S Ct 1221, 93 L Ed 1528 (1949), and concluded that a pretrial order denying a motion to dismiss on the ground of former jeopardy fell within *Cohen's* "collateral-order exception to the final-judgment rule." *Abney v. United States, supra*, 431 US at 662.

One of the *Cohen* factors is whether the order appealed from involves an important right that would be lost, perhaps irreparably, if review had to await final judgment. In the course of its analysis of that factor, the Court explained the nature of the federal constitution's former jeopardy protection:

> "[T]he Double Jeopardy Clause protects an individual against more than being subjected to double punishments. It is a guarantee against being twice put to *trial* for the same offense." *Abney v. United States, supra*, 431 US at 660-61. (Emphasis in original.)

It stated that "the rights conferred on a criminal accused by the Double Jeopardy Clause would be significantly undermined if appellate review of former jeopardy claims were postponed until after conviction and sentence." 431 US at

660. The court said: "We therefore hold that pretrial orders rejecting claims of former jeopardy, such as that presently before us, constitute 'final decisions' and thus satisfy the jurisdictional prerequisites of [28 USC] § 1291." 431 US at 662.

If the source of the right to appeal in *Abney* was the federal constitution itself, as defendant argues, we fail to see why the Court went to great pains to frame the issue as one of statutory construction. We also fail to see why the Court would have emphasized what has become a maxim: that the federal constitution does not give a defendant the right to appeal.[8] The nature of the Court's analysis and the specificity in its holding persuade us that *Abney* is merely a case of statutory construction of a federal statute and not one that establishes a constitutional mandate for interlocutory appeals throughout the several states.

Defendant lists numerous state court decisions from other jurisdictions that cite *Abney* as they hold that a defendant has a right to an interlocutory appeal from the denial of a pretrial motion to dismiss on the ground of former jeopardy. However, many of those cases locate the source of that right as the Court in *Abney* did, by construing a respective state statute or rule to provide for an interlocutory appeal in that state. *See, e.g., State v. Jenich*, 94 Wis 2d 74, 288 NW2d 114 (1980). Defendant concedes that our legislature has not enacted a statute that allows for a direct interlocutory appeal under the circumstances presented here.

Finally, defendant argues that the statutory scheme in Oregon violates the Equal Protection Clause of the federal constitution. We reject that argument for the same reasons that we rejected defendant's equal privileges and immunities challenge under the state constitution. *See State v. Freeland*, 295 Or 367, 370, 667 P2d 509 (1983).

Reconsideration allowed; appeal dismissed; order modified to delete costs.

Footnotes, State v. Salzmann, 119 Or. App. 219 (1993)

1. The order assessed costs against defendant. We modify the order and assess no costs to either party.

2. If defendant is convicted, he can appeal and assign error to the court's ruling on the former jeopardy question. ORS 138.040; ORS 138.053(1)(a). *See State v. Brown*, 262 Or 442, 497 P2d 1191 (1972). If the court erred, we could reverse the conviction. *See State v. Embry*, 19 Or App 934, 530 P2d 99, *rev den* (1975). Consequently, the issue presented here is not whether defendant has the right to any appellate review, but whether he has the right to a direct interlocutory appeal on the former jeopardy issues *before* enduring another trial.

3. As the same time defendant pursued this interlocutory appeal, he sought to have the Oregon Supreme Court review the circuit court's order by way of an alternative writ of mandamus. ORS 34.120; ORAP 11.05. The court denied the petition without explanation.

4. We note a scenario, not present here, in which we would have explicit statutory authority to review a court's denial of a motion to dismiss on the ground of double jeopardy. If the state appealed from a pretrial order suppressing evidence, ORS 138.060(3), the defendant could file a cross-appeal, ORS 138.040, which would authorize us to review "[a]ny decision" that the district or circuit court had made "in an intermediate order or proceeding." ORS 138.060(1)(a).

5. In *State ex rel Wark v. Freerksen*, 84 Or App 90, 733 P2d 100, *rev den* 303 Or 534 (1987), a district court denied the defendant's motion to dismiss on the ground of former jeopardy. A circuit court issued a peremptory writ of mandamus directing the district court judge to vacate the order. The defendant trial judge appealed, ORS 34.240, and argued that mandamus was not a proper remedy, because direct appeal from the judgment in the criminal trial was a plain, speedy and adequate remedy in the ordinary course of law. *See* ORS 34.110. We rejected that argument. We acknowledged that direct appeal in criminal cases generally is regarded as a plain, speedy and adequate remedy in the ordinary course of law, *State ex rel Automotive Emporium v. Murchison*, 289 Or 265, 267, 611 P2d 1169 (1980), but concluded that the prospect of being unconstitutionally placed in jeopardy twice for the same offense was a sufficient injury to justfy mandaumus. *State ex rel Wark v. Frerksen, supra*, 84 Or App at 93-94.

We do not know whether the Supreme Court agrees with our conclusion in *Freerksen*. However, the Supreme Court's denial of defendant's petition for a writ of mandamus in this case does not necessarily mean that the court has determined that mandamus is an inappropriate remedy in every case in which a circuit court denies a motion to dismiss on the ground of former jeopardy.

6. Article VII (amended), section 2, of the constitution provides:

> "The courts, jurisdiction, and judicial system of Oregon, except so far as expressly changed by this amendment, shall remain as at present constituted until otherwise provided by law. But the supreme court may, in its own discretion, take original jurisdiction in mandamus, quo warranto and habeas corpus proceedings."

7. At that time, 28 USC § 1292 provided in part:

> "The courts of appeal shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * * except where a direct review may be had in the Supreme Court."

8. *But see* Arkin, "Rethinking the Constitutional Right to a Criminal Appeal," 39 UCLA L Rev 503 (1992), for a scholarly criticism of *McKane v. Durston, supra,* which the author claims is the shaky foundation for the Court's rule.

IN THE CIRCUIT COURT
OF THE STATE OF OREGON

STATE OF OREGON, Plaintiff,	))	NO. C91-11-36157 DEFENDANT'S
	)	POSTTRIAL
PETER JOSEPH SALZMANN, Defendant.	)))	MOTION TO DISMISS

Defendant request oral argument and anticipates that this motion will take approximately one-half judicial day to hear.

Defendant moves the court for an order dismissing the Indictment upon the ground that the former prosecution bars the prosecution of the defendant. Defendant will submit a detailed memorandum as soon as possible.

POINTS AND AUTHORITIES

ORS 135.470; 131.505-131.535

Art I, § 12, Or Const

Amendment V and XIV, US Const.

Dated: May 6, 1992

Respectfully submitted,

/s/
John Henry Hingson III- #71082
Attorney for the Appellant

IN THE SUPREME COURT
OF THE STATE OF OREGON

STATE OF OREGON, Respondent/Respondent,	)	NO. C91-11-36157
	)	ORDER DENYING
v.	)	REVIEW
	)	
PETER JOSEPH SALZMANN, Appellant/Petitioner.	)	CA A75561
	)	
	)	SC S39872

The Court has considered the petition for review and orders that it be denied.

DATE: June 22, 1993

/s/ WALLACE P. CARSON, JR.
WALLACE P. CARSON, JR.
CHIEF JUSTICE

COPIES TO:

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Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

No. 93-439

In the Supreme Court of the United States

OCTOBER TERM, 1993

PETER JOSEPH SALZMANN,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did defendant raise a federal double jeopardy claim in state trial court?

2. Does the double jeopardy clause require States to provide defendants with an interlocutory appeal as a matter of right?

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No. 93-439

In the Supreme Court of the United States

OCTOBER TERM, 1993

PETER JOSEPH SALZMANN,

Petitioner,

v.

STATE OF OREGON,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF OREGON

BRIEF IN OPPOSITION

The State accepts defendant's statement of jurisdiction, the opinions below, and the constitutional provisions involved.

STATEMENT OF THE CASE

Defendant's federal claim arises in an unusual procedural posture. Although defendant argues that the federal double jeopardy clause creates the right to an interlocutory appeal, he never preserved the underlying federal right he seeks to vindicate on appeal. Nor does he have a non-frivolous federal claim in light of the procedural posture in which this issue arises. Because this issue is procedurally more complex than defendant's petition suggests, this brief will first describe the issues defendant raised in state trial court and the trial court's resolution of them. It then will discuss the state procedures for seeking interlocutory review. Finally, it will discuss the state courts' resolution of defendant's requests for appellate review.

A. Defendant's Trial.

Defendant was charged with six counts of rape, kidnapping, and robbery. He raised a double jeopardy claim twice during his

trial. The first claim was raised midway through the State's case in chief. Defendant filed five alternative motions, all of which arose out of the same discovery dispute. Only the third motion is relevant here.[1] Defendant's third motion asked the trial court to declare a mistrial and dismiss the case under the double jeopardy clause. Defendant, however, based his third motion solely on state constitutional grounds. The memorandum he filed in support of this motion only cited cases decided under the state constitution.[2] Similarly, when defendant argued his motion orally before the state trial court, he limited his double jeopardy claim to state constitutional grounds.[3]

After considering defendant's evidence, the state trial court denied his third motion without explanation.[4] (Tr. 646). The State accordingly proceeded to put on the rest of its case, as did defendant. When the case was submitted to the jury, the jury was unable to reach a verdict. (Tr. 1038–39). On defendant's motion, the trial court declared a mistrial because of the hung jury and set a date for the new trial. (Tr. 1040).

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[1] The first motion asked the trial court to dismiss the case as an exercise of its discretion. (Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss/Suppress/Mistrial, Etc. at 21–22). The second motion asked the court to exclude evidence. (*Id.*, at 23). Defendant withdrew the fourth motion. (Tr. 574). The trial court reserved ruling on the fifth motion for contempt at defense counsel's request. (Tr. 647).

[2] Defendant's memorandum in support of his motion states: "[T]he court should declare a mistrial and dismiss the indictment under the principles of *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983)." (Defendant's Memorandum of Law in Support of Defendant's Motion to Dismiss/Suppress/ Mistrial, Etc. at 23). *State v. Kennedy* based its decision solely on the state constitution. *See* 295 Or., at 266–67.

[3] At oral argument, defendant cited three cases in support of his double jeopardy claim: *State v. Kennedy*, *supra*; *State v. Rathbun*, 287 Or. 421, 600 P.2d 392 (1979); and *State v. Halford*, 101 Or. App. 660, 792 P.2d 467 (1990). (Tr. 599–600). All three are based solely on the state constitution.

[4] The trial court also denied the other alternative motions that were not withdrawn or reserved. (Tr. 645–47).

Defendant raised his second double jeopardy claim after the jury failed to reach a verdict but before the new trial began. He filed a document captioned "Posttrial Motion to Dismiss." (*See* Pet. for Cert. at A-11). His post-trial motion arose out of the same discovery disputes that formed the basis for the five alternative motions he had filed mid-trial. Defendant again claimed that the prosecutor's failure to provide him with discovery barred the State from retrying him. As part of the "Points and Authorities" in support of his motion, defendant cited without any discussion Article I, section 12 of the Oregon Constitution and the Fifth and Fourteenth Amendments.[5] (*See* Pet. for Cert. at A-11).

Although defendant's post-trial motion referred to the Fifth Amendment, defendant later explained that he based his motion on state constitutional grounds. At the hearing on his motion, defendant's counsel told the trial court: "The fact is that there has been a mistrial [because of the hung jury], the fact is from our standpoint that [the] prosecution should be barred by the double jeopardy principles of the Oregon Constitution."[6] (*Ibid.*). Defense counsel never referred to the federal constitution, and the trial court sought to clarify the basis for defendant's argument. (Tr. 1137). It asked, "[D]o you have the cases that you're relying on?" (*Ibid.*). The court explained that it understood defendant to be relying on two state cases, *State v. Kennedy*, 295 Or. 260, 666 P.2d 1316 (1983), and *State v. Fortune*, 112 Or. App. 247, 828 P.2d 483 (1992). (*Ibid.*). Both cases are based

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[5] The motion states that "[d]efendant will submit a detailed memorandum as soon as possible." (Pet. for Cert. at A-11). The trial court record shows, however, that no memorandum was submitted.

[6] Defendant did not rely on the mistrial resulting from the hung jury as the basis for his double jeopardy claim. Rather, he reasoned that because the hung jury could lead to a second trial, the trial court should consider his claim that the state constitution barred the prosecutor from retrying him because of his failure, in defendant's view, to provide him with complete discovery.

solely on the state double jeopardy clause. Defendant agreed that these were the cases on which he was relying. (*Ibid.*).

Not only did defendant base his post-trial motion solely on the state constitution, but he also agreed with the trial court that his motion was limited in an additional respect. Defense counsel noted that one of the mid-trial motions he filed earlier asked that the prosecutor be held in contempt for failing to provide him with discovery. (Tr. 1135; *see* note 1 *supra*). He also noted that the trial court had reserved ruling on this motion. (*Ibid.*). Because defense counsel appeared to view his post-trial motion as a continuation of the earlier motion for contempt, the trial court asked whether the post-trial request for dismissal based on double jeopardy principles was separate from or part of the contempt motion. (Tr. 1138). Defense counsel responded that he viewed the request for dismissal as an alternative sanction for contempt. (*Ibid.*). He noted that the motion for contempt had been made during trial, "that the motion is still before the court, and that it is appropriate to proceed on that." (*Ibid.*). Although defendant's point is not completely clear, he appears to have argued that double jeopardy principles were relevant to the extent they informed the trial court's determination of the appropriate sanction for a finding of contempt.

The state trial court accordingly considered defendants' double jeopardy claim as part of his contempt motion. After hearing additional evidence offered in support of defendant's post-trial motion, the state trial court ruled that some of the information that defendant felt should have been disclosed was not discoverable. (Tr. 1148–49). Although some of the evidence presented a closer question in terms of discovery, the court found it unnecessary to decide that issue to resolve defendant's motion. (Tr. 1149). The court ruled that even if the evidence were discoverable, the prosecutor lacked the mental state that would require that the case be dismissed under the state double jeopardy clause. (*Ibid.*). The court explained that it was "not willing to make a finding of, as required by the case[s], that [the prosecutor] knew that his conduct was improper and would prejudice [defendant]." (*Ibid.*).

The state trial court accordingly denied defendant's post-trial motion to dismiss, and defendant sought interlocutory review of the trial court's ruling. Before discussing the state appellate courts' resolution of this case, this brief will first discuss the state procedures that are generally available for obtaining interlocutory review.

B. State Appellate Procedure.

In Oregon, the right to appeal is governed by statute. *See* Or. Rev. Stat. § 138.005 *et seq.* The Oregon statutes do not provide for interlocutory appeals as a matter of right. They do, however, provide that a party who is dissatisfied with an interlocutory ruling may petition for a writ of mandamus. Or. Rev. Stat. § 34.105 *et seq.* Mandamus is a discretionary remedy. Or. Rev. Stat. § 34.110. Additionally, mandamus is only available in a certain class of cases.[7] The Oregon Court of Appeals has recognized, however, that a pretrial ruling denying a double jeopardy motion is the kind of ruling that may be considered on mandamus. *State ex rel. Wark v. Freerksen*, 84 Or. App. 90, 94, 733 P.2d 100 (1987). Because the remedy is discretionary, however, a petitioner challenging a double jeopardy ruling must still demonstrate that his or her claim presents a sufficiently significant question to warrant mandamus. A claim that seeks to relitigate the trial court's factual findings is not sufficient. *State ex rel. Ware v. Hieber*, 267 Or. 124, 128-29, 515 P.2d 721 (1974).

C. Defendant's Appellate Review.

After the state trial court denied defendant's post-trial motion to dismiss, defendant pursued two alternative courses. First, he

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[7] Generally, three classes of cases may not be reviewed on mandamus. Mandamus is not available: (1) to question a trial court's exercise of discretion, Or. Rev. Stat. § 34.110; *State ex rel. Venn v. Reid*, 207 Or. 617, 624-25, 298 P.2d 990 (1956); (2) where an appeal from final judgment will provide an adequate remedy, *State ex rel. LeVasseur v. Merten*, 297 Or. 577, 686 P.2d 366 (1984); or (3) to relitigate the trial court's factual findings, *State ex rel. Ware v. Hieber*, 267 Or. 124, 128-29, 515 P.2d 721 (1974).

petitioned for a writ of mandamus to the Oregon Supreme Court. The Oregon Supreme Court denied the petition.[8]

Second, defendant filed a notice of appeal in the Oregon Court of Appeals. He also asked the Court of Appeals to determine whether it had jurisdiction to hear his interlocutory appeal. Defendant acknowledged that he had no statutory right to an interlocutory appeal. He argued, however, that various state and federal constitutional provisions, including the federal double jeopardy clause, required that he be given an interlocutory appeal.

The Court of Appeals initially issued a brief order dismissing defendant's appeal for want of jurisdiction. When defendant petitioned for reconsideration, the Court of Appeals issued an opinion adhering to its original ruling. The opinion addresses defendant's claims that the state and federal constitutions require that he be given an interlocutory appeal. The Oregon Supreme Court denied defendant's petition for review. Defendant now petitions for a writ of certiorari to the Oregon Court of Appeals to review its order dismissing his interlocutory appeal for want of jurisdiction.

REASONS TO DENY CERTIORARI

Defendant's petition for certiorari should be denied for three reasons. First, the question defendant raises is purely hypothetical. Even if the Court were to hold that defendant is entitled to an interlocutory appeal, defendant failed to preserve the underlying federal claim he seeks to vindicate on appeal. The holding defendant seeks will have no effect on his federal rights. Second, defendant has no colorable federal double jeopardy claim. The trial court's factual finding that the prosecutor lacked the requisite intent disposes of it. This case accordingly does not provide an appropriate vehicle for considering the issue defendant raises. Third, the issue defendant raises does not warrant

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[8] A state order denying a petition for mandamus is similar to a federal order denying a petition for certiorari. Neither explains the basis for the ruling.

certiorari. This Court's decisions are clear, and there is no uncertainty among the States that requires resolution.

A. The Issue Defendant Raises Is Hypothetical.

The question presented is narrow. Defendant argues that the federal double jeopardy clause requires States to provide interlocutory appeals as a matter of right. Defendant raised this federal issue at the first possible opportunity, when he asked the Oregon Court of Appeals to determine whether it had jurisdiction over his appeal. Defendant, however, never raised the underlying federal claim in state trial court. He never argued in state trial court that the federal double jeopardy clause barred the State from retrying him. Rather, he based his underlying double jeopardy claim solely on state constitutional grounds.

In this procedural posture, the question defendant's petition presents is purely hypothetical. Even if the Court were to hold that the federal double jeopardy clause creates the right to an interlocutory appeal, defendant never preserved the underlying federal claim he seeks to vindicate on appeal. Defendant's failure to preserve his underlying federal claim bars him from raising that claim in the state appellate courts. *See State v. Castrejon*, 317 Or. 202, 207, 856 P.2d 161 (1993) (failure to preserve federal constitutional claim below bars a party from raising it on appeal); *State v. Walton*, 311 Or. 223, 240–41, 809 P.2d 81 (1991) (same). Defendant has no underlying federal claim left to vindicate in the state appellate courts even if the double jeopardy clause required Oregon to provide him with an interlocutory appeal.[9]

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[9] The point is not that this Court lacks jurisdiction to consider any of petitioner's federal claims. *See* 28 U.S.C. § 1257(a). The Court has jurisdiction to consider the federal issue defendant raised and the Oregon Court of Appeals reached — whether the federal double jeopardy requires States to provide interlocutory appeals. *See Whitney v. California*, 274 U.S. 357, 360–63 (1927). The point is that defendant's failure to raise the underlying federal claim at trial would bar him, as a matter of state law, from raising it in the state appellate courts even if this Court were to hold that the double jeopardy clause requires that he be given an interlocutory

(continued...)

It follows that the issue defendant asks the Court to decide is purely advisory. It will have no effect on his federal rights. Put another way, defendant lacks standing to raise this issue. *See Allen v. Wright*, 468 U.S. 737, 751 (1984). The judicial relief defendant requests — a declaration that he has a right to an interlocutory appeal — will not redress his underlying federal claim. Whether described as a lack of standing or a request for an advisory opinion, the procedural posture in which this case arises makes it a poor vehicle for deciding whether the double jeopardy cause requires States to provide interlocutory appeals.

Defendant's discussion of this issue is limited to two sentences. His petition states in text that defendant "moved to dismiss based on double jeopardy, due to the prosecutor's misconduct." (Pet. for Cert. at 2). It states in a footnote that "[t]he argument on misconduct was on both state and federal grounds." (Pet. for Cert. 2 n. 1). A review of the record demonstrates otherwise.

As noted in the statement of the case, defendant raised a double jeopardy claim twice in the trial court. The first time was midway through the State's case-in-chief when defendant filed his motion for a mistrial and dismissal under the double jeopardy clause. He based his double jeopardy claim, however, entirely on the state constitution. He never referred to the federal constitution and the cases he cited in his supporting memorandum and at oral argument were based solely on state constitutional grounds.

The second time defendant raised a double jeopardy issue was after the state trial court declared a mistrial because of the hung jury. Although defendant's post-trial motion to dismiss cited the Fifth Amendment as a basis for the motion, defendant subsequently explained at the hearing on his motion that he was basing his claim on the state constitution. When the state trial court questioned him about the authority on which he relied, defendant

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[9](...continued)
appeal. *See State v. Walton*, 311 Or., at 240–41. It might also be noted that defendant's failure to preserve the underlying federal claim in state court would preclude this Court from reaching that claim, as opposed to his claimed federal right to an interlocutory appeal. *See* 28 U.S.C. § 1257(a).

agreed that he was relying on state cases that were decided solely under the state constitution. Beyond that, defendant also agreed that the double jeopardy principles he urged were relevant only to determining the appropriate sanction for a state contempt violation.

Because state procedural rules bar defendant from raising the underlying federal claim in the state appellate courts, this case provides no occasion to decide whether the double jeopardy clause requires States to provide defendants with interlocutory appeals.

B. Defendant Has No Colorable Federal Claim.

Certiorari should be denied for a second reason. Even if the underlying federal claim were preserved, defendant faces another, equally difficult hurdle. The state trial court's factual findings demonstrate that defendant's underlying federal claim is frivolous. The federal double jeopardy clause bars a retrial only when the governmental "conduct giving rise to the successful motion for mistrial was intended to provoke the defendant into moving for a mistrial." *Oregon v. Kennedy*, 456 U.S. 667, 679 (1982). The prosecutor's intent is a question of fact, and the state trial court's factual finding will ordinarily be dispositive. *Ibid.* As the Court explained in *Oregon v. Kennedy*, the state trial court's finding that the prosecutor did not act intentionally "is the end of the matter for the purposes of the Double Jeopardy Clause of the Fifth and Fourteenth Amendments to the United States Constitution." *Ibid.*

In this case, the state trial court tested the prosecutor's conduct against the more stringent state constitutional standard and found that the prosecutor did not act knowingly.[10] If, as the state trial court found, the prosecutor did not act knowingly, then

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[10] The state double jeopardy clause bars a retrial if the prosecutory knew that the conduct that prompted the mistrial was improper and either intended or was indifferent to the resulting mistrial. *State v. Kennedy*, 295 Or., at 276. As noted above, the state trial court explained that it was "not willing to make a finding of, as required by the case[s], that [the prosecutor] knew that his conduct was improper and would prejudice [defendant]." (Tr. 1149).

he clearly did not act intentionally. After the state trial court's factual finding, defendant has no colorable federal double jeopardy claim. *Oregon v. Kennedy*, 456 U.S., at 679. Even if defendant could still pursue a federal double jeopardy claim in state appellate court, there is little reason to decide whether defendant has a federal constitutional right to an interlocutory appeal when the state trial court's adverse factual findings are, as the Court put it in *Oregon v. Kennedy*, "the end of the matter for the purposes of the Double Jeopardy Clause of the Fifth and Fourteenth Amendments." *Ibid.*; *cf. Richardson v. United States*, 468 U.S. 317, 322 (1984) (only colorable double jeopardy claims may be appealed under the collateral order doctrine).

C. Defendant's Constitutional Claim Does Not Warrant Certiorari.

Not only does this case provide a poor vehicle for considering the question defendant's petition presents, but the question itself does not warrant granting certiorari. Defendant's petition raises three reasons why either the Oregon Court of Appeals erred or why the Court should grant certiorari. First, defendant argues that the protections guaranteed by the double jeopardy clause would be meaningless if there were no interlocutory appeal. Second, he claims that *Abney v. United States*, 431 U.S. 651 (1977), establishes that an interlocutory appeal is constitutionally required. Finally, he argues that other States have allowed interlocutory appeals. None of these arguments provide any reason to grant certiorari.

Defendant argues initially that the right not to be tried twice would be "meaningless if there is no mechanism, such as an appeal, to review the double jeopardy claim before the second trial." (Pet. for Cert. at 5). Defendant overstates his case in at least two respects. First, he gives too little weight to the trial court's resolution of his federal claims. A trial court's ability to rule on a double jeopardy claim gives the federal right some

meaning.[11] Indeed, because the federal constitution does not require States to create appellate courts, *see McKane v. Durston*, 153 U.S. 684, 687 (1894), there is no reason to think that the constitution contemplates that the right requires any greater protection. Defendant, for his part, never explains why appellate review, as opposed to review by the trial court, is necessary to give the constitutional right meaning.[12]

At least in Oregon, defendant's argument fails in a second respect. In Oregon, a defendant may always petition an appellate court for a writ of mandamus to prevent the trial from going forward. To be sure, the remedy is discretionary. State appellate courts will not grant mandamus to hear frivolous claims or to second-guess the trial court's resolution of factual issues. But the possibility that mandamus will be granted when the trial court's denial of a double jeopardy claim merits review refutes defendant's argument that the federal right is "meaningless" in Oregon absent an appeal as matter of right. Other States have reached the same conclusion. *See People ex rel. Mosley v. Carey*, 74 Ill. 2d 527, 387 N.E.2d 325, 330–31, *cert. denied* 444 U.S. 940 (1979); *State v. Robideaux*, 475 N.W.2d 915, 916 (N.D. 1991); *State v. Jenich*, 94 Wisc. 2d 74, 292 N.W.2d 348 (1980). In the State's view, the premise of defendant's argument has little logic to recommend it.

Defendant's second point is based on *Abney v. United States*, *supra*. He says that a "fair reading of *Abney* establishes that it is constitutionally based." (Pet. for. Cert. at 10). Both *Abney* and later decisions make clear that it is not. The Court framed the issue in *Abney* as "whether a pretrial order denying a motion to

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[11] Where, as here, the federal right turns on the trial court's factual findings, the trial court's determination will usually be dispositive. It is the appeal that will be meaningless, not the right.

[12] Defendant's point might have more force if it were based on equal protection, but defendant's petition rests solely on the double jeopardy clause. The question presented refers only to the double jeopardy clause, (Pet. for Cert. at i), and the only constitutional provision petitioner identifies as relevant is the Fifth Amendment, (*See id.*, at 2).

dismiss on double jeopardy grounds is a final decision within the meaning of 28 U.S.C. § 1291, and thus immediately appealable." 431 U.S., at 653. The Court was careful to make clear that the "right of appeal . . . is purely a creature of statute; in order to exercise that statutory right of appeal one must come within the terms of the applicable statute — in this case, 28 U.S.C. § 1291." 431 U.S. at 656.

The remainder of the Court's inquiry focuses on whether a double jeopardy claim is a collateral order and thus a "final decision" within the meaning of section 1291. One of the tests for a collateral order is that it must involve a right that would be "'lost, probably irreparably,' if review had to wait until final judgment." 431 U.S. at 658. The Court explained that double jeopardy claims meet this test because the right, by its terms, is a right not be tried. 431 U.S. 661-62. The Court did not hold that appellate review was constitutionally required to vindicate a double jeopardy claim. Nor did it hold that consideration by the trial court was insufficient to protect a defendant's constitutional right not to be tried twice. Rather, it held that an order denying a double jeopardy claim comes within a limited class of orders for which Congress has authorized immediate review.

Not only is *Abney* not controlling, but its reasoning provides little guidance for the issue defendant raises here. Because *Abney* started from the proposition that section 1291 authorizes immediate review for a limited class of pretrial orders, *see Cohen v. Beneficial Industrial Finance Corp.*, 337 U.S. 541 (1949), the only question the Court addressed was whether an order denying a double jeopardy claim is the kind of order Congress intended to be reviewed now rather than later. It neither asked nor answered the question whether immediate review is constitutionally necessary to vindicate a defendant's double jeopardy rights. Defendant errs in reading it as if it did. Had *Abney* held that the collateral order doctrine is constitutionally required to protect double jeopardy rights, then defendant's interpretation of *Abney* might be justified. The collateral order doctrine, however, originated almost 30 years earlier when the Court held that a plaintiff could bring an immediate appeal from a pretrial order

requiring that he to post a bond. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S., at 544–45. All that *Abney* sought to do was determine whether a double jeopardy claim was sufficiently analogous to the bond requirement in *Cohen* to justify an immediate appeal. Its reasoning provides no support for defendant's claim.

Were there any doubt that *Abney* is statutorily based, the Court's subsequent cases remove it. In *Richardson v. United States*, 468 U.S. 317 (1984), the Court stated that "we held [in *Abney*] that the denial of a pretrial motion to dismiss an indictment on double jeopardy grounds was appealable as a 'collateral order' under 28 U.S.C. § 1291." 468 U.S., at 320. It explained that "we held that the claim in *Abney* met the three-part test established in *Cohen v. Beneficial Industrial Loan Corp.*, [337 U.S. 541 (1949)]." *Ibid.* Similarly, in *Midland Asphalt Corp. v. United States*, 489 U.S. 794 (1989), the Court described *Abney* as one of several decisions defining what constitutes a collateral order for the purposes of section 1291. 489 U.S., at 799. The Court explained that the nature of the right (whether constitutional or statutory) is relevant to determining whether it is a right not to be tried or a right whose remedy requires the dismissal of the charges. *Id.*, at 801. Only the former is sufficient to constitute a collateral order for the purposes of section 1291. *Ibid.* These opinions describe *Abney* for what it is, a statutorily based decision.

Although both *Abney* and the Court's subsequent decisions make clear that the issue in *Abney* was statutory, defendant raises two arguments to support his contrary interpretation of the decision. He argues initially that the Court has reserved the question whether *Abney* states a statutory or a constitutional rule. (Pet. for Cert. at 9). Defendant bases this argument on two dissents from the denial of certiorari. (*See ibid.*). One case is simply inapposite. *See Green v. Ohio*, 455 U.S. 976 (1982) (White, J., dissenting from the denial of certiorari). In *Green*, the state procedure allowed the defendant to take an interlocutory appeal. *Id.*, at 977. The case accordingly did not present the

issue defendant raises here. The dissent's point, on which defendant relies, went to a separate issue. *Id.*, at 978–79. The dissent noted that the Court had jurisdiction because the state court ruling was final for the purposes of section 1257(a). *Ibid.*; *see Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 479 (1975). Far from reserving the question whether the holding in *Abney* was constitutionally based, the dissent in *Green* addressed a different issue.

The other case defendant cites, *Spradling v. Texas*, 455 U.S. 971 (1982) (Brennan, J., dissenting from the denial of certiorari), is more to the point. The fact, however, that the dissent would have granted certiorari does not mean that the Court considered the issue an open one. Moreover, even the dissent did not say that the double jeopardy clause requires an interlocutory appeal, as defendant argues. *See* 455 U.S., at 973. The dissent would have relied on the equal protection clause, an issue defendant does not raise here. *Ibid.*; *see* note 12 *supra*. In any event, to the extent it was unclear whether *Abney* was based on constitutional or statutory grounds, the Court's subsequent decision in *Richardson v. United States*, *supra*, removed any doubt. In *Richardson*, the Court described *Abney*'s holding as statutory. 468 U.S., at 320.

The point of defendant's second argument is not completely clear. Defendant discusses several cases holding that federal statutes authorize federal appellate courts to review interlocutory orders. (Pet. for Cert. at 9–11). One case addresses when state rulings are considered final for the purposes of section 1257(a). *Mitchell v. Forsythe*, 472 U.S. 511, 525 n. 8 (1985). The others address when a federal decision is considered a final decision for the purposes of section 1291. *See Mitchell v. Forsythe*, 472 U.S., at 527–30; *Richardson v. United States*, *supra*; *Helstoski v. Meanor*, 442 U.S. 500 (1979); *Stack v. Boyle*, 342 U.S. 1 (1951). None of these statutory cases is relevant to the constitutional issue defendant raises unless one assumes that the constitu-

tion requires States to provide interlocutory review whenever Congress authorizes federal courts to do so.[13]

Finally, defendant argues that the state courts have varied in their reading of *Abney*. As he puts it, "Some say it describes a constitutional right. Some say it does not. . ." (Pet. for Cert. at 6). It might be more accurate to say that two States have read *Abney* as being constitutionally based.[14] The other States that have reached this issue have concluded that *Abney* is statutorily based.[15] Beyond that, a number of States have allowed interlocutory appeals as a matter of state procedure for the same reasons that persuaded this Court in *Cohen v. Beneficial Finance Corp.* and *Abney*.[16] A number of States have declined to allow inter-

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[13] In the course of his argument, defendant restates what appears to be the premise of his petition: "When a constitutional guarantee protects a defendant from going to trial at all, there must be a tool to effectuate that right." (Pet. for Cert. at 10). Defendant never explains, however, why the trial court's consideration (especially when coupled with the right to seek mandamus) is not constitutionally sufficient even though Congress may choose to provide interlocutory review for comparable federal district court decisions.

[14] *See Nalbandian v. Superior Court*, 163 Ariz. 126, 786 P.2d 977 (Ariz. App. 1989), *cert. denied* 111 S. Ct. 554 (1990); *Ex parte Robinson*, 641 S.W.2d 552, 554-55 (Tex. Cr. App. 1982).

[15] *See Burleson v. State*, 552 So.2d 186 (Ala. Cr. App. 1989); *People ex rel. Mosley v. Carey*, *supra*; *State v. Joseph*, 92 N.C. App. 203, 374 S.E.2d 132 (1988); *State v. Robideaux*, *supra*; *State v. Miller*, 289 S.C. 426, 346 S.E.2d 705 (1986).

[16] *See, e.g., State v. McKenna*, 188 Conn. 671, 453 A.2d 435 (1982); *Patterson v. State*, 248 Ga. 875, 287 S.E.2d 7 (1982); *State v. Hanson*, 483 A.2d 723 (Me. 1984); *Neal v. State*, 272 Md. 323, 322 A.2d 887 (1974); *Griffin v. State*, 545 So.2d 729, 732 (Miss. 1989); *State v. Milenkovich*, 236 Neb. 42, 458 N.W.2d 747 (1990); *State v. Janvrin*, 121 N.H. 370, 430 A.2d 152 (1981); *State v. Maestas*, 93 N.M. 765, 605 P.2d 1164 (1980).

locutory appeals but provide, as a matter of state law, for review by mandamus or certiorari.[17]

These variations in state procedure provide no reason to grant certiorari, and the fact that not all States read *Abney* identically does not present the sort of sharply defined conflict that requires resolution. Moreover, even if this issue warranted consideration at some point, this case hardly provides the occasion. Because defendant never raised a federal double jeopardy claim at trial, the question his petition presents is purely hypothetical. Beyond that, defendant has no colorable double jeopardy claim after the state trial court found that the prosecutor lacked the requisite intent.

CONCLUSION

For the reasons stated above, defendant's petition for certiorari should be denied.

Respectfully submitted,

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[17] *See People ex rel. Mosley v. Carey*, 387 N.E.2d, at 324 (Ill.); *State v. Robideaux*, 475 N.W.2d, at 916 (N.D.); *State v. Jenich*, 292 N.W.2d, at 349 (Wisc.); *State v. Sundel*, 460 A.2d 939 (R.I. 1983); *Whitwell v. State*, 529 S.W.2d 338 (Tenn. 1975); *Stamper v. State*, 672 P.2d 106 (Wyo. 1983).